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No. 80-2205

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, Illinois,

Petitioner,

vs.

TONI MURRAY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether absolute judicial immunity shields the Clerk of the Circuit Court of Cook County from §1983 damages liability when performing judicial or quasi-judicial functions.

LIST OF PARTIES BELOW

The parties in the Court below not named in the caption in this brief are defendants City of Chicago, John Ziemke, Theodore Pappas, Sgt. Meyers, James Rochford, and James O'Grady.

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In The

Supreme Court of the United States

October Term, 1980

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, Illinois,

Petitioner,

vs.

TONI MURRAY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals is reported, *Murray v. City of Chicago*, 634 F.2d 365 (7th Cir. 1981). (Pet. Cert. App. A at 1a) The opinion of the District Court (Pet. Cert. App. B at 8a) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 25, 1980. A timely petition for rehearing *en banc* was denied on March 31, 1981. (Pet. Cert. App. C at 24a) On March 11, 1981, the Seventh Circuit issued an amended opinion. The petition for a writ of *certiorari* was filed on June 29, 1981 and was granted on November 2, 1981. This Court's jurisdiction rests upon 28 U.S.C. §1254(1).

STATUTE INVOLVED

Title 42 U.S.C.

§1983. Civil action for deprivation of rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

A. Background

On March 23, 1979, respondent Toni Murray filed this §1983 complaint against the petitioner, Morgan M. Finley, the Clerk of the Circuit Court of Cook County, the City of Chicago and five Chicago Police Officers, for alleged violations of constitutional rights when respondent was arrested on a recalled arrest warrant on March 25, 1975. The following facts led to respondent's arrest on the recalled warrant.

On June 18, 1974, respondent was charged in a misdemeanor complaint filed in the Circuit Court of Cook County with deceptive practices in violation of Ill. Rev. Stat. 1979, ch. 38, §17-1(d). (J.A. 31) A summons was issued for respondent to appear in court to answer the charge. (J.A. 31) On July 12, 1974, the summons was returned to the court because the respondent could not be found. (J.A. 31) On July 22, 1974 Judge Michael F. Zlatnik issued a warrant for respondent's arrest in the amount of $500.00. (J.A. 31) On October 8, 1974, the warrant was returned and filed with the court because respondent had been arrested on the warrant. (J.A. 31) This was the first arrest in respondent's criminal case. Respondent did not challenge this arrest in her §1983 complaint.

On November 4, 1974, respondent, free on bond, appeared in Judge Zlatnik's court where her deceptive practices charge was continued on the prosecutor's motion to December 9, 1974. (J.A. 31)

On December 9, 1974, respondent failed to appear in court. Judge Zlatnik issued the following order as reflected on the memorandum of orders: "Recognizance

of defendant and surety forfeited—warrant ordered vs. defendant $1500." (J.A. 31) Respondent did not challenge the issuance of this warrant in her §1983 complaint.

On January 13, 1975, before Judge Goldstein, sitting for Judge Zlatnik, respondent appeared in court to quash and vacate the warrant issued on December 9, 1974. The memorandum of orders reflects that Judge Goldstein released respondent on her own recognizance ("'I Bond' $500") and recalled the outstanding warrant for her arrest. (J.A. 31) The court granted the prosecutor's motion for a continuance until January 27, 1975. The deputy clerk, Maurice McNicholas, entered this order on the memorandum of orders. (J.A. 22)

Deputy Clerk McNicholas then filled out a warrant recall form, No. 131593. (J.A. 18, 22) The deputy clerk and Judge Goldstein signed respondent's warrant recall form. (J.A. 18, 22) Deputy Clerk McNicholas was unable to obtain respondent's signature. (J.A. 18, 22) The deputy clerk kept one copy of the warrant recall form for the court file, placed the rest of the copies in the bundle of "out work" for January 13, 1975, for his courtroom, and deposited the bundle at a receiving location for disposal and sorting of the forms and files by other deputy clerks. (J.A. 22)

On January 27, 1975, Judge Zlatnik granted the prosecutor's motion for a continuance to February 10, 1975. (J.A. 31) On February 10, 1975, Judge Zlatnik granted respondent's motion to dismiss the deceptive practices complaint against her.

On March 25, 1975, Chicago Police Officers John Ziemke and Theodore Pappas arrested respondent on the bond forfeiture arrest warrant issued December 9, 1974 and recalled on January 13, 1975. (J.A. 31) The

Chicago Police Officers' affidavits reflect that they did not know the warrant was recalled. (J.A. 25-30)

Respondent alleged in her §1983 complaint that she was transported from her home to the police station, strip-searched and incarcerated. (J.A. 7) After six or seven hours respondent was released from custody by posting bond. (J.A. 7) On April 10, 1975, respondent appeared in Judge Zlatnik's court where the prosecutor moved for respondent's discharge in the criminal case. (J.A. 31) The last entry on the memorandum of orders reflected "no warrants outstanding". (J.A. 31)

B. Warrant Recall Procedures

Illinois statutes governed the respondent's criminal proceedings. In Illinois, when a person like respondent is arrested and charged with an offense by the State's Attorney, a date is set for the defendant to appear in court. If the defendant is released on bond, pursuant to Ill. Rev. Stat. 1979, ch. 38, §110-10, and fails to appear in court, a condition of the bond, the State's Attorney then moves for a bond forfeiture and a warrant to issue. Ill. Rev. Stat. 1979, ch. 38, §§110-7(h), 110-10(a)(1) and 110-3. The court enters an order declaring the bail to be forfeited, and an order requiring notice of the order of forfeiture to be mailed to the defendant's last known address. The court then may issue an arrest warrant for the defendant's failure to appear. Ill. Rev. Stat. 1979, ch. 38, §§110-7(h) and 110-3. The court continues the case during which time the defendant can appear, surrender, move to quash and recall the warrant, and vacate the bond forfeiture order. Ill. Rev. Stat. 1979, ch. 38, §110-7(h). The clerk enters all orders on the reverse side of the misdemeanor complaint which contains the memorandum of orders. (J.A. 16, 31) In the instant case, these procedures were followed by the judge, prosecutor and the court clerk.

In effect at the time of respondent's arrest on the recalled warrant were General Order 74-8(M) and the petitioner's procedures designed to implement the General Order. On August 13, 1974, the Presiding Judge of the Municipal Department of the Circuit Court of Cook County, signed General Order No. 74-8(M) which created "Procedure Re: Motion to Vacate Bond Forfeiture and Recall of Warrants In all Courts (Except Traffic)." (J.A. 23) In pertinent part the General Order stated:

> All motions to vacate bond forfeiture and warrants orders made after the judgment date . . . shall be processed as follows:
>
> * * *
>
> b. The warrant may be recalled, provided defendant is in court. The clerk shall deliver the warrant recall to the Central Warrant Unit. The court sergeant shall notify the witnesses of the trial date which shall be the judgment date. (J.A. 23)

The court sergeant is a police officer assigned to a criminal courtroom. It is his function to notify crime victims and arresting officers of the new trial date since they could not have known that the defendant voluntarily appeared in court on a date other than the date set for trial.

In order to implement the General Order, Robert Grossman, the petitioner's Chief Deputy Clerk of the First Municipal District, Criminal Division, of the Circuit Court of Cook County, issued a memorandum to the deputy clerks in the Criminal Division notifying them of "New Procedure on Bring-Back B/F [bond forfeiture] files. Effective August 15, 1974." (J.A. 16, 19) The memorandum, issued the same day as the General Order, reflected that the new procedures were developed by representatives from the petitioner's office, the Pre-

siding Judge, the Chicago Police Department, and the Cook County State's Attorney's Office. (J.A. 17, 19)

The petitioner's procedures included the following steps to implement General Order 74-8(M):

> When an outstanding warrant is ordered recalled by a judge, it is the duty of the clerk to follow this procedure:
>
> a. The clerk notes the recall order on the "half sheet" [memorandum of orders].
> b. The clerk fills out a warrant recall order and obtains the judge's signature.
> c. The clerk sends the original of this order to the Chicago Police Department [Central Warrant Unit] and sends copies of the order to the office of the Clerk by placing all copies with outbound mail.
> d. The clerk places a copy of the order in the Court file. (J.A. 16-17)

In the instant case three of the four procedures were unquestionably followed. (J.A. 17) As for notification to the Police Department, either a deputy clerk mailed the warrant recall order to the police and it was lost in the mail or the recall order was inadvertently lost somewhere between the courtroom and petitioner's office.

C. Rulings Below

Respondent filed a §1983 complaint against the petitioner seeking damages resulting from her arrest on the recalled warrant, and from the harm that allegedly flowed from that arrest. (J.A. 2-11) After examining the petitioner's documents and affidavits in support of his motion to dismiss, or in the alternative, for summary judgment, the District Court concluded:

> [T]he procedures outlined previously were followed as to the plaintiff's arrest warrant. At best, it can only be said that if the Police Department did not receive notice of the recall, the subsequent arrest of the plaintiff was the result of inadvertence or accident. Such circumstances cannot give rise to an action under 42 U.S.C. Section 1983. *Little v. Walker*, 552 F.2d 193, Seventh Circuit, 1977; *Bonner v. Coughlin*, 545 F.2d 565, Seventh Circuit, 1976. (Pet. Cert. App. B at 19a)

The court granted petitioner's motion for summary judgment.

The Seventh Circuit reversed the judgment for all defendants below, remanded the case for trial, and held that "[s]omeone is surely at fault for failing to establish or execute appropriate procedures for preventing such serious malfunctionings in the administration of justice." *Murray v. City of Chicago, supra*, 634 F.2d at 366. In a footnote, the Seventh Circuit concluded:

> It is quite possible that the clerk of court, Finley, will also ultimately be dismissed if by amplified clarification of his procedures, he is able to establish that the methods used to convey recall orders to the police department are appropriate and adequate. *See Schnell v. City of Chicago*, 407 F.2d 1084, 1086 (7th Cir. 1968).
>
> Mere negligence of course, will not support a §1983 action against Finley. *See Bonner v. Coughlin*, 545 F.2d 565, 568 (7th Cir. 1976). Moreover, pending further clarification of the facts it would be premature to consider whether Finley is entitled to the defense of official immunity. *See Dieu v. Norton*, 411 F.2d 761, 763 (7th Cir. 1969). *Id.* at 367 n.4.

The petitioner appeals to this Court from the Seventh Circuit's holding which denied petitioner judicial immunity at the present stage of the pleadings.

SUMMARY OF ARGUMENT

The Clerk of the Circuit Court of Cook County contends that absolute judicial immunity shields court clerks from §1983 damages liability when the clerk performs judicial or quasi-judicial functions. The Seventh Circuit Court of Appeals denied the petitioner absolute immunity at the summary judgment stage of the pleadings. The Seventh Circuit's decision below was contrary to its prior holdings and to the well established majority rule today that court clerks are entitled to absolute immunity from §1983 damages liability. This Court's reversal of the Seventh Circuit's holding in this case would establish the court clerk's entitlement to absolute judicial immunity, the majority rule, as the law of the land.

The petitioner is an essential officer of the court who enables the court to properly perform its judicial duties. In Cook County, Illinois, the petitioner's deputy clerks are present every day to assist circuit court judges in the performance of their judicial duties in seven divisions and in six municipal districts throughout Cook County. In this case the petitioner's deputy clerks implemented the judge's order recalling respondent's warrant pursuant to court ordered procedures formulated by a joint committee of representatives from the Chicago Crime Commissions, the judiciary, the Chicago Police Department, the Cook County State's Attorney's Office, and petitioner's office. The deputy clerk assigned to the judge who issued respondent's warrant recall order followed every procedure required of him to note the recall order on the memorandum of orders, to fill out a warrant recall order, to obtain the judge's

signature, and to place a copy of the recall order in the court file. (J.A. 16-24) The letter notifying the Chicago Police Department of the fully executed warrant recall order was not received by the police department. At common law, and in other similar §1983 decisions, judicial immunity shielded court clerks who performed related judicial or quasi-judicial functions as though the court had performed the act.

Historical and public policy considerations are the foundation for petitioner's absolute immunity from §1983 damages liability. *Imbler v. Pachtman*, 424 U.S. 409, 421, 424 (1976). At common law, prior to the passage of the Civil Rights Act of 1871, court clerks were immune from liability when performing acts ordered by the court. A presumption existed that matters which the clerk was required to submit to the judge for approval were performed under the direction and with the approval of the judge. A court ordered act performed by the clerk was a judicial or quasi-judicial act cloaked with immunity from liability. A court clerk's negligent failure to carry out a court order did not subject the court clerk to liability because the clerk's act was considered the act of the judge who was not amenable to suit at common law. *Bradley v. Fisher*, 80 U.S. 646 (13 Wall. 335), 20 L.Ed. 646 (1872). This common law immunity for court clerks clearly survived the passage of the Civil Rights Act of 1871 as evidenced by the majority rule followed in Circuit Courts of Appeals that court clerks enjoy absolute immunity from §1983 damages liability.

The allegations in respondent's §1983 complaint against petitioner all related to acts and injuries which are indistinguishable from the allegations in the majority of cases barring similar §1983 plaintiffs from

challenging court clerks' conduct performed within the scope of the clerk's judicial employment. Every Circuit Court of Appeals, except the Fourth Circuit, has found the court clerk immune from §1983 damages liability for acts done in the performance of the clerk's judicial or quasi-judicial functions. Neither the nature of the clerk's duties nor the manner of performance has been a factor in the determination of the clerk's immunity when the act was performed under a judge's supervision and intimately related to judicial proceedings.

The majority of Circuits implicitly recognized that the judicial immunity doctrine embraces the reality that errors will be committed by clerks in courts with overcrowded dockets. Court clerks, indispensable aides of the court, must have the freedom as judges to discharge their duties. To deny court clerks the immunity enjoyed by the judges in a legal system presently subjected to unprecedented strains, would instill in all clerks the fear that one inadvertent mistake will subject the clerk to §1983 liability damages, will inhibit the clerk's active interest to contribute toward positive improvements to the administration of the judicial system, and as a result will deny the public its right to the most efficient administration of the judicial process. Immunity shields the petitioner when he aids the judge he serves by devising procedures best suited in the petitioner's judgment, to implement judicial orders including those orders recalling warrants.

Available alternatives to §1983 liability for clerks of the court provide superior methods for insuring that the public is able to remedy a court clerk's conduct. A clerk who wilfully deprived someone of constitutional rights can be punished criminally. *See* 18 U.S.C. §242. In Il-

linois, a court clerk can be punished criminally for failing to timely enter of record any order of his court and can be removed from office for any subsequent failure to comply with his statutory duties. Ill. Rev. Stat. 1979, ch. 25, §15. *See also* Ill. Rev. Stat. 1979, ch. 25, §4. These federal and state remedies, therefore, protect the public from the acts of clerks of the court who, contrary to the allegations in this case, wilfully acted beyond the scope of their authority or, who in the absence of judicial directives, wilfully failed to comply with statutory duties.

The District Court properly granted summary judgment for the petitioner where no genuine issue of material fact existed. Fed.R.Civ.P. 56(e). The petitioner's uncontroverted affidavits and documents clearly supported the District Court's conclusion "that the warrant recall procedures of the Circuit Court of Cook County are not unconstitutional as applied to the allegations of the plaintiffs' complaint." (Pet. Cert. App. B at 18a) No further clarification of the facts was necessary to determine whether the petitioner was entitled to absolute judicial immunity for acts performed pursuant to court order.

ARGUMENT

ABSOLUTE JUDICIAL IMMUNITY SHIELDS THE CLERK OF THE CIRCUIT COURT OF COOK COUNTY FROM §1983 DAMAGES LIABILITY WHEN THE CLERK PERFORMS JUDICIAL OR QUASI-JUDICIAL FUNCTIONS.

The petitioner's entitlement to absolute judicial immunity from §1983 damages liability is the majority rule in the Circuits today.* The Seventh Circuit's leading decisions extending judicial immunity to court clerks like petitioner relied on this Court's decision in *Pierson v. Ray*, 386 U.S. 547 (1967). This Court held that the common law doctrine of judicial immunity for judges survived the Civil Rights Act of 1871. *Id. See Brown v. Dunne*, 409 F.2d 341 (7th Cir. 1969); *Dieu v. Norton*, 411 F.2d 761 (7th Cir. 1969); *Bradley v. Fisher*, 80 U.S. 646 (13 Wall. 335), 20 L.Ed. 646 (1872).

Despite the well-established extension of the judicial immunity doctrine to court clerks, the Seventh Circuit,

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* *Sullivan v. Kelleher*, 405 F.2d 486 (1st Cir. 1968); *Slotnick v. Garfinkle*, 632 F.2d 163 (1st Cir. 1980); *Blouin v. Dembitz*, 367 F.Supp. 415 (S.D.N.Y. 1973), *aff'd on other grounds*, 489 F.2d 488 (2d Cir. 1973); *Lockhart v. Hoenstine*, 411 F.2d 455 (3d Cir. 1969); *Steinpreis v. Shook*, 377 F.2d 282 (4th Cir. 1967); *Zimmerman v. Spears*, 428 F.Supp. 759 (W.D.Tex. 1977), *aff'd on other grounds*, 565 F.2d 310 (5th Cir. 1977); *Denman v. Leedy*, 479 F.2d 1097 (6th Cir. 1973); *Dieu v. Norton*, 411 F.2d 761 (7th Cir. 1969); *Brown v. Dunne*, 409 F.2d 341 (7th Cir. 1969); *Panko v. Rodak*, 606 F.2d 168 (7th Cir. 1979), *cert. denied*, 444 U.S. 1081 (1980); *Davis v. McAteer*, 431 F.2d 81 (8th Cir. 1970); *Rhodes v. Houston*, 202 F.Supp. 624 (D.Neb. 1962), *aff'd*, 309 F.2d 959 (8th Cir. 1962), *cert. denied*, 372 U.S. 909 (1963); *Stewart v. Minnick*, 409 F.2d 826 (9th Cir. 1969); *Hamrick v. Norton*, 322 F.Supp. 424 (D.Kan. 1970), *aff'd*, 436 F.2d 940 (10th Cir. 1971). *Contra*, *McCray v. Maryland*, 456 F.2d 1 (4th Cir. 1972); *Williams v. Wood*, 612 F.2d 982 (5th Cir. 1980).

in the instant case, retreated from its own precedent and refused to hold the petitioner, the Clerk of the Circuit Court of Cook County, absolutely immune from §1983 damages liability. This Court's reversal of the Seventh Circuit's holding below would establish the court clerk's entitlement to absolute judicial immunity, the majority rule, as the law of the land.

A. The Petitioner Is An Essential Officer Of The Court Who Enables The Court To Properly Perform Its Judicial Duties.

Judges recognize that "no court can discharge its judicial duties without the aid of clerks." *Blouin v. Dembitz*, 367 F.Supp. 415, 422 (S.D.N.Y. 1973), *aff'd on other grounds*, 489 F.2d 488 (2d Cir. 1973). Without dispute, the clerk is an integral part of the ever-expanding judicial machinery buckling under "unprecedented strains". *Polk County v. Dodson*, ... U.S. ....., 50 U.S.L.W. 4077, 4080 (No. 80-824, decided December 14, 1981). In Cook County, Illinois, one of the most populous areas in the country, petitioner's deputy clerks are present to assist each judge in the performance of the court's judicial duties. Every day of the year petitioner assists the Circuit Court of Cook County in the court's law, chancery, county, domestic relations, juvenile and criminal divisions as well as in the six municipal districts in Cook County. In the instant case, petitioner's deputy clerks were present to assist the court in the implementation of all court orders including warrant recall orders like the one involved in the instant case.

In 1975, respondent's misdemeanor case was one of over one-half million misdemeanor cases filed in the Circuit Court of Cook County. *1979 Annual Report to the Supreme Court of Illinois*, Administrative Office of the Illinois Courts, p. 39 (1979). The issuance of the warrant recall order in respondent's case was representative of

thousands of other warrant recall orders issued by the Circuit Court and implemented by the petitioner's deputy clerks.

General Order 74-8(M), issued on August 13, 1974, by the Presiding Judge of the First Municipal District of the Circuit Court of Cook County established procedures for warrant recall requests made either prior to or after entry of judgment on the bond forfeiture. (J.A. 23-24) The General Order required the clerk to "deliver the warrant recall to the Central Warrant Unit" of the Chicago Police Department. (J.A. 23) Beginning August 15, 1974, two days after the issuance of the Presiding Judge's Order, the petitioner instituted procedures to implement court order 74-8(M). (J.A. 19)

Petitioner's methods and procedures regarding warrant recall orders were formulated in 1974 by a joint committee of representatives from the Chicago Crime Commission, the judiciary, the Chicago Police Department, the Cook County State's Attorney's Office, and petitioner's office. (J.A. 17, 19) Deputy clerks were advised of the court's new warrant recall procedures by office memorandum. The petitioner's procedures were detailed in the petitioner's Operating Manual which was distributed among all deputy clerks. (J.A. 17, 19-21)

In 1974, the petitioner and the Presiding Judge created and implemented these procedures to insure notification to victims and police officers of new court dates and to insure notification to the police department of warrant recall orders. (J.A. 19) These procedures were in effect at the time of the respondent's arrest on the recalled warrant on March 25, 1975.

The respondent, while free on bond, failed to appear in court on the set court date. Ill. Rev. Stat. 1979, ch. 38, §110-10. (J.A. 31) The court ordered respondent's bail

forfeited, issued a bond forfeiture arrest warrant, and set a return date for entering judgment on the bond forfeiture order. Ill. Rev. Stat. 1979, ch. 38, §§110-7(h) and 110-3. (J.A. 31) Prior to entry of judgment respondent voluntarily appeared in court without notice to the complainant. The court sustained respondent's motions to quash the outstanding warrant and to vacate the bond forfeiture order. (J.A. 31) The court continued the case again after allowing respondent to remain free on bond.

The petitioner cooperated closely with the Presiding Judge in this case "in order that judicial duties may be properly accomplished." *Dennis v. Sparks*, 449 U.S. 24, 30 (1980). In the instant case, the act of the petitioner was the act of the court. *Ex parte Morgan*, 114 U.S. 174, 175 (1885). At common law, judicial immunity shielded clerks who performed similar judicial or quasi-judicial functions as though the court itself had performed the act.

B. Historical And Public Policy Considerations Are The Foundation For Petitioner's Absolute Immunity From §1983 Damages Liability.

In *Pierson v. Ray*, 386 U.S. 547 (1967) and *Imbler v. Pachtman*, 424 U.S. 409 (1976), this Court provided the framework for determining whether absolute judicial immunity shields petitioner. The liability of court clerks under §1983 must be determined in the same manner that this Court determined absolute legislative immunity (*Tenney v. Brandhove*, 341 U.S. 367 (1951)), judicial immunity (*Pierson v. Ray, supra*, 386 U.S. 547), and prosecutorial immunity (*Imbler v. Pachtman, supra*, 424 U.S. 409), as well as qualified official immunity (*Scheuer v. Rhodes*, 416 U.S. 232 (1974)).

In *Imbler v. Pachtman, supra,* 424 U.S. at 421 and 424, this Court held:

> Rather, each [case] was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common-law and . . . whether the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under §1983.

Within this framework, historical and public policy considerations insulate court clerks from liability for judicial or quasi-judicial acts.

In Illinois the office of the Clerk of the Court was created by Article IV, Section 6 of the Illinois Constitution of 1818. The Illinois Constitution allowed the circuit court to appoint the clerk if his office was vacant when the court was not in session "in order that the administration of justice might not be delayed for the want of so important an officer of the Court as a clerk." *People v. Mobley,* 2 Ill. 214, 221 (1835). The present Illinois Constitution continues to recognize the special relationship of the Clerk of the Court to the judiciary where the Clerk's Office, as well as the State's Attorney's Office, originate in the Judiciary Article. ILL. CONST. art. VI, §§18 and 19 (1970).

At common law, the clerk was clearly an officer of the court and not an executive or legislative officer. *People v. Brady,* 275 Ill. 261, 262-263 (1916). This Court consistently recognized that officers "within the ordinary meaning of that term . . . [included] . . . marshals, bailiffs, court clerks or judges." *Cammer v. United States,* 350 U.S. 399, 405 (1956). *See Shadwick v. City of Tampa,* 407 U.S. 345, 351 (1972) (A court clerk is a judicial officer "assigned to the . . . municipal court judge for whom he does much of his work."); *Ferri v. Ackerman,* 444 U.S. 193, 202 n.19 (1979) (The clerk is

an officer of the court); *cf. Haldane v. Chagnon*, 345 F.2d 601, 604 (9th Cir. 1965) (Bailiffs are "entitled to the protection of the judicial immunity which surrounded the whole court."); *Johnson v. Granholm*, 662 F.2d 449, 450 (6th Cir. 1981) ("Friends of the court" enjoyed absolute immunity from §1983 damages liability when failing to perform state statutory and court ordered quasi-judicial duties to insure that the plaintiff's former husband made child support payments as ordered in a divorce decree.).

The clerk historically performed custodial, clerical and court ordered functions. The "clerk of the court is an officer of the court who has charge of the clerical part of [the court's] business and keeps its records and seal, issues process, enters judgments and orders, [and] makes certified copies from the record." *People v. Brady, supra*, 275 Ill. at 262.

At common law, judges supervised the clerk's conduct in and out of the courtroom. *See Board of Supervisors of Peoria County v. Roche*, 65 Ill. 77 (1872). When recording judgments of the court, the clerk's "recording is in legal effect the act of the court, and subject to its judicial control." *Ex parte Morgan, supra*, 114 U.S. 174, 175 (1885). *Accord Commonwealth v. Thompson*, 65 Ky. (2 Bush) 559, 560 (1866). Illinois law required judges to inspect the clerk's office and to issue orders to the clerk regarding the operation of the clerk's office. Ill. Rev. Stat. 1845, p. 147, §39; Ill. Rev. Stat. 1979, ch. 25, §22. The court possessed its books, papers, and records through its clerk. "The clerk is a necessary adjunct and part of the court. His possession is the possession of the court." *In re Lyman*, 55 F. 29, 42 (S.D.N.Y. 1893).

In addition to the judiciary's control over its clerks, state legislatures enacted laws prescribing the clerk's

duties and responsibilities. *See* Ill. Rev. Stat. 1845, p. 147, §35; Ill. Rev. Stat. 1979, ch. 25, §13; *People v. Mobley, supra*, 2 Ill. at 225. Prior to the passage of the Civil Rights Act of 1871, the bulk of lawsuits filed in state courts against clerks were primarily actions on the clerk's surety bond.

Illinois state law, representative of the other states' bond laws, required the clerk of the court to post a surety bond "for faithful performance of the duties of his office, and to pay over all moneys that may come to his hands by virtue of his office, to the parties entitled thereto." Ill. Rev. Stat. 1979, ch. 25, §4; Ill. Rev. Stat. 1845, p. 144, §15. Pursuant to this statutory fiduciary contract with the state's litigants, court clerks "agree that they shall be responsible if he fails to perform his official duty, and it is for this purpose that the bond is required." *Governor v. Dodd*, 81 Ill. 162, 164 (1876). The bond statute, therefore, required the clerk to perform ministerial acts mandated by state law.

State courts which predicated the clerk's liability on the ministerial nature of the clerk's fiduciary duty to the parties, for example, to enter a verdict for the proper party or to accept a sufficient surety bond to cover a verdict on appeal, strictly construed the legislature's intent to allow this narrow recovery on the bond against the clerk. *See Lick v. Madden*, 36 Cal. 208 (1868); *Gullick v. New*, 14 Ind. 93 (1860); *State v. Merritt*, 65 N.C. 558 (1871); *Mann's Appeal*, 1 Pa. 24 (1845); *Pass v. Dibrell*, 16 Tenn. (8 Yerg.) 470 (1835); *Clark v. Wilcox*, 31 Tex. 32[2] (1868); and *Russel v. Clayton*, 7 Va. (7 Call.) 41 (1801).

In Illinois, however, prior to 1871, in order to maintain an action against the clerk for approving a bond with insufficient surety, the Illinois Supreme Court re-

quired the plaintiff to allege that the clerk acted wilfully and maliciously. *Billings v. Lafferty*, 31 Ill. 318, 322 (1863). *See also McFarlan v. People*, 13 Ill. 9 (1851). In Massachusetts, no right of action existed on the clerk's bond where there was "nothing in the act which shows a design to protect individual sufferers against the negligence of the clerk to pay over moneys which may come into his hands." *Crocker v. Fales*, 13 Mass. 260, 261 (1816). The clerk's liability, therefore, was a function of statutory construction. Clerks were not always strictly liable on their bond for failure to perform ministerial duties required by state law.

The body of pre-1871 common law which evolved from actions on the clerk's bond clearly expressed the narrow view that when clerks acted in a fiduciary relationship with litigants, the plaintiff could recover on the clerk's bond if the clerk's conduct prevented the plaintiff from recovering against the defendant in the underlying tort or contract action. At common law, the clerk's judicial relationship with the court, however, remained superior to the unique fiduciary relationship with private litigants.

State courts which found the court clerk liable at common law for failure to perform an act considered ministerial did so because the act was mandated by the bond statute rather than because the act was required to be performed under the direction of the judge. The clerk was immune from liability when performing acts ordered by the court. At common law a presumption existed that matters which the clerk was required to submit to the judge for approval were performed under the direction and with the approval of the judge. *The Philadelphia Wilmington & Baltimore Railroad Company v. Howard*, 13 How. 305, 331, 14 L.Ed. 157, 168 (1851). *See also* 11 C.J. Clerks of Courts, §91 (1917)

A court-ordered act performed by the clerk was a judicial or quasi-judicial act not a ministerial act. At common law "the only reasonable construction to be given to this language [of the statute] is, that all these acts, thus required of the clerk, are to be performed by him as clerk, acting ministerially, under the direction of the law, and not under the direction of the court; and they may be done as well out of court, as in court." *People v. Fletcher*, 3 Ill. 482, 488 (1840).

A court clerk acting pursuant to a general order of the Circuit Court was excused from liability for failing to comply with a state statute. *Davidson v. Wiley Bank & Co.*, 31 Ala. (Book 25) 452 (1858). When the court directed the clerk to enter a judgment "he will not be a wrong-doer for following such directions, even if they prove in the end to be erroneous . . . and the law will protect him in so doing." *Hoeffner v. Stratton*, 57 Me. 360, 362 (1869).

At common law, a clerk was not liable for damages caused by his mistake in failing to enter judgment. *Commonwealth v. Thompson, supra*, 65 Ky. at 560. A clerk's mistake was not "fraud, culpable negligence, or willful wrong." *Id.* The Kentucky Supreme Court concluded:

> [T]he orders and judgments drawn by him, although erroneous and prejudicial to the rights of parties, are, when approved and signed by the court, to be presumed to be the acts of the court rather than the clerk, for which, for obvious reasons, and on well-settled principles, no right of action exists.
>
> *Id.* at 560.

The clerk's negligence, therefore, was no exception to the clerk's immunity from liability. *See also Billings v. Lafferty, supra*, 31 Ill. 318 (1863). The act of the clerk was the act of the court. *Thompson, supra*, 65 Ky. at 560;

Ex parte Morgan, supra, 114 U.S. at 175. The clerk was no more liable for damages than the court if the court had performed the act it had ordered the clerk to perform. Prior to 1871, despite the ministerial label attached to the clerk's duties, the clerk's primary relationship with the court became the judicial source of the clerk's immunity.

Recent common law decisions reinforce the historical application of the doctrine of judicial immunity to court clerks who performed ministerial acts pursuant to court order (*Yamamoto v. Santa Cruz County Board of Supervisors,* 124 Ariz. 538, 606 P.2d 28 (Ct. App. 1980)), judicial functions (*City of Louisville v. Bergel,* 610 S.W.2d 292 (Ky. 1980)), and quasi-judicial acts (*Rodriguez v. State of New York,* 55 Misc.2d 669, 285 N.Y.S.2d 896 (N.Y. Ct. Cl. 1967)). Neither the manner of the performance nor the ministerial nature of the act affected the absolute immunity of the court clerk from liability.

In *Yamamoto, supra,* 124 Ariz. at 540, the Arizona Appellate Court relied on *Dieu v. Norton, supra,* 411 F.2d 761 (7th Cir. 1969), the leading Seventh Circuit §1983 court clerk immunity decision, to support the Appellate Court's holding for the court clerk. The Kentucky Supreme Court relied on *Shadwick v. City of Tampa, supra,* 407 U.S. 345 (1972), as controlling authority for the clerks' immunity. *City of Louisville, supra,* 610 S.W.2d at 293. The Kentucky Supreme Court held that the court clerks' erroneous issuance and approval of an arrest warrant was "done in due course of their employment, [and] were judicial functions . . . This being true, under familiar principles of judicial immunity neither [clerk] is liable." *Id.*

In *Rodriguez, supra*, 55 Misc.2d 669, the claimant filed an unlawful imprisonment action against the State of New York based on the following facts. A judge signed an order discharging the claimant from a sentence of probation while he was serving a prison sentence for an unrelated offense. The clerk of the court failed to notify the New York Department of Corrections of the probation termination order. Nearly one year later, however, after Rodriguez completed his prison sentence, the Department of Corrections, believing that he was still on probation, arrested the claimant for violating the previously terminated probation. A judge other than the one who placed Rodriguez on probation found him guilty of violating his previously terminated probation and sentenced the claimant to serve four months in custody. In addition to his damages claim, Rodriguez claimed that he contracted tuberculosis while in custody on the violation due to the state clerk's alleged negligence, malfeasance, and carelessness. The trial court dismissed the action against the court clerk.

On appeal, the New York Court of Claims affirmed the dismissal. The Court held:

> Courts have stated it to be the law by which this court must be bound that a County Court Clerk, as part of a court that had been absorbed into the State judicial system, is protected from the consequences of acts which are quasi-judicial in nature and require the exercise of judgment and discretion as also are such acts of a County Judge.
>
> The Court finds the Clerk's duty of notification that probation had ended to be a quasi-judicial act related to the sentencing process. Thus it differs from duties of the Clerk to keep and certify records, which duties have been classified as ministerial in nature. *Id.* at 673-674.

The *Rodriguez* court granted the clerk judicial immunity based on the same historical and public policy reasons supporting judicial immunity for judges:

> Harsh though the application of the rule of judicial immunity may seem, it is essential to bear in mind the comment of Judge Learned Hand in *Gregoire v. Biddle*, (177 F.2d 579, 581) that liability under such circumstances "would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Id.* at 674.

In addition to these policy considerations the court relied on *Yates v. Lansing*, 5 Johns. 282 (N.Y. 1810),* recognized by this Court as the earliest American judicial immunity decision at common law prior to the Civil Rights Act of 1871. *See Imbler v. Pachtman, supra*, 424 U.S. at 423 n. 20. The "doctrine which holds a judge exempt from a civil suit or indictment, for any act done, or omitted to be done, by him, sitting as judge has a deep root in the common law" for clerks as well as judges and prosecutors. *Yates v. Lansing, supra*, 5 Johns. at 291; *Imbler v. Pachtman, supra*, 424 U.S. at 423 n. 20.

Only one §1983 decision, *McCray v. Maryland*, 456 F.2d 1 (4th Cir. 1972), has failed to recognize that clerks historically "were protected by the traditional doctrine of judicial immunity, and this rule of law was not abolished by §1983." *Dieu v. Norton, supra*, 411 F.2d at 763, citing *Pierson v. Ray, supra*, 386 U.S. at 553-555. The *McCray* decision represents the only §1983 Circuit Court of Appeals decision refusing to apply judicial immunity to court clerks due to the ministerial nature of those duties performed by the clerk not required by

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* In *Rodriguez v. State of New York, supra*, 55 Misc.2d at 674, the court relied on *Fishbein v. State of New York*, 204 Misc. 151, 154 (Ct.Cl. 1953), which cited *Yates v. Lansing, supra*, 5 Johns. 282, in a judicial immunity decision.

court order. This decision represents the minority rule in the Circuits on the clerks' immunity and is contrary to the well-established common law foundation for the clerks' judicial immunity from §1983 liability. This common law immunity clearly survived the passage of the Civil Rights Act of 1871 as evidenced by the majority rule followed in Circuit Courts of Appeals that court clerks enjoy absolute immunity from §1983 damages liability.

C. The Petitioner's Absolute Judicial Immunity From §1983 Liability Is The Majority Rule Followed By The Circuit Courts Of Appeals.

Respondent's §1983 complaint alleged that petitioner was liable for damages because petitioner's deputy clerks' negligent failure to notify the Chicago Police Department that the court had recalled respondent's arrest warrant caused her arrest, custodial strip-search and seven hour detention on the recalled warrant. Petitioner is not alleged to have personally failed to communicate, supervise, or implement respondent's warrant recall order. Petitioner cannot be held liable on the basis of *respondeat superior* and could have been properly dismissed on that ground. *Rizzo v. Goode*, 423 U.S. 362, 370-371, 375-377 (1976); *Monell v. Department of Social Services*, 436 U.S. 658, 690-695 (1978); and *Polk County v. Dodson, supra*, 50 U.S.L.W. at 4080-4081 (A "general allegation of administrative negligence fails to state a constitutional claim cognizable under §1983."). *See also Murray v. City of Chicago*, 634 F.2d 365, 367 n. 4 (7th Cir. 1981) ("Mere negligence, of course, will not support a §1983 action against Finley. See *Bonner v. Coughlin*, 545 F.2d 565, 568 (7th Cir. 1976).")

The petitioner's absolute judicial immunity from damages liability is an equally compelling ground for

dismissal of respondent's §1983 complaint. The allegations in the complaint against the petitioner all related to acts and harm which are indistinguishable from the allegations in the majority of cases barring similar §1983 plaintiffs from challenging court clerks' conduct performed within the scope of the clerk's judicial employment.

The First Circuit affirmed the summary judgment for the court clerk who allegedly failed to give the plaintiff tenant legal notice of a court ordered eviction. However, judicial immunity prevented the court clerk from being "held personally liable for any defects in service of process, if indeed there were such defects." *Sullivan v. Kelleher*, 405 F.2d 486, 487 (1st Cir. 1968). In *Slotnick v. Garfinkle*, 632 F.2d 163 (1st Cir. 1980), the First Circuit upheld the court clerk's motion to dismiss where the clerk issued altered criminal commitment papers for the plaintiff's admission to a hospital. The First Circuit held that where the court clerk carried out "the official directives of a judge" the clerk enjoyed judicial immunity. *Id.* at 166.

The Second Circuit affirmed the District Court's grant of summary judgment for the court clerk who implemented the Family Court's procedure to issue arrest warrants for husbands who failed to appear in response to summons served by mail. *Blouin v. Dembitz*, 367 F.Supp. 415, 422 (S.D.N.Y. 1973), *aff'd on other grounds*, 489 F.2d 488 (2d Cir. 1973). The Third Circuit affirmed the District Court's dismissal of a §1983 complaint against the Clerk of the Pennsylvania Supreme Court who failed to file the plaintiff's disciplinary petition against a lower court judge pursuant to the Chief Justice's order and direction. The District Court held:

> Thus, assuming that the failure to file said petition was patently violative of complainant's civil rights,

no basis in law exists whereby civil liability can be imposed upon a public official acting pursuant to court order and direction. *Ginsburg v. Stern*, 125 F.Supp. 596, 603 (W.D. Penn. 1955), *aff'd*, 225 F.2d 245 (3d Cir. 1955).

Cf. Smith v. Rosenbaum, 460 F.2d 1019, 1020 (3rd Cir. 1972) (The court clerk was protected by §1983 judicial immunity when performing ministerial acts mandated by state statute.); *Lockhart v. Hoenstine*, 411 F.2d 455 (3rd Cir. 1969).

The Fifth Circuit affirmed the District Court's order dismissing the §1983 complaint against the District Court Clerk who "judicially" enforced Internal Revenue Service summonses directed to the plaintiffs. *Zimmerman v. Spears*, 428 F.Supp. 759 (W.D. Tex. 1977), *aff'd on other grounds*, 565 F.2d 310 (5th Cir. 1977). The Court held that "clerks of the court are also entitled to immunity the same as judges when performing their duties." *Id.* at 762. *But see Williams v. Wood*, 612 F.2d 982 (5th Cir. 1980).

The Sixth Circuit affirmed the District Court's ruling granting the court clerk's motion to dismiss where the clerk improperly failed to fix the plaintiff's bail following his arrest. The Sixth Circuit held that where the act was performed within the scope of his official quasi-judicial duties, the clerk was entitled to immunity. *Denman v. Leedy*, 479 F.2d 1097, 1098 (6th Cir. 1973).

In *Panko v. Rodak*, 606 F.2d 168, 171 (7th Cir. 1979), *cert. denied*, 444 U.S. 1081 (1980), the Seventh Circuit held that the Clerk of this Court and his deputy were entitled to judicial immunity from damage liability for their docketing actions because the Clerk of this Court and his deputy were official aides of the Court when "carrying out judicial or quasi-judicial functions within

their authority." Similarly, in the instant case, warrant recall orders are unquestionably part of the circuit court's judicial functions. In enforcing and executing the court orders, the petitioner clearly carried out judicial and quasi-judicial functions within his authority. *See also Dieu v. Norton, supra,* 411 F.2d 761, and *Brown v. Dunne, supra,* 409 F.2d 341.

In *Davis v. McAteer,* 431 F.2d 81 (8th Cir. 1970), the clerk lost certain court files that would have corroborated the plaintiff's claim that his drug induced guilty plea was invalid. The Eighth Circuit affirmed the District Court clerk's motion to dismiss, holding that "clerks of courts are entitled to immunity the same as judges." 431 F.2d at 83. *See also Rhodes v. Houston,* 202 F.Supp. 624 (D. Neb. 1962), *aff'd,* 309 F.2d 959 (8th Cir. 1962), *cert. denied,* 372 U.S. 909 (1963).

The Ninth Circuit affirmed the District Court's order dismissing the plaintiff's §1983 complaint against the court clerk who refused to furnish the plaintiff a portion of his state criminal trial transcript. The Court held that the act charged to the clerk was an act performed in his capacity as a quasi-judicial officer and that the clerk was clothed with judicial immunity. *Stewart v. Minnick,* 409 F.2d 826 (9th Cir. 1969).

In another Ninth Circuit §1983 decision the Court held:

> At best, [plaintiff] has charged [the court clerk] with some kind of responsibility for her failure to receive notice of the May 5, 1975, order [depriving her of custody of her son]. His failure, if any, to perform a ministerial duty which was a part of judicial process is also clothed with quasi-judicial immunity.

Morrison v. Jones, 607 F.2d 1269, 1273 (9th Cir. 1979).

Thus, whether the clerk's duty is described as ministerial or judicial, the majority rule is that petitioner's failure to notify the Chicago Police Department did not deprive him of his judicial or quasi-judicial immunity from §1983 liability.

Finally, the Tenth Circuit affirmed the District Court's ruling granting the court clerk's motion to dismiss where the clerk failed to send a certified copy of the plaintiff's notice of appeal to the Clerk of the Kansas Supreme Court pursuant to a statutory duty. The District Court held that this act did not state a cause of action where "there are authorities which prescribe that clerks of court are immune from liability under 42 U.S.C. §1983, for acts done in performance of their official duties." *Hamrick v. Norton*, 322 F.Supp. 424, 426 (D. Kan. 1970), *aff'd*, 436 F.2d 940 (10th Cir. 1971).

In each of the above cases the Court found the clerk immune from §1983 damages liability for acts done in the performance of the clerk's judicial or quasi-judicial functions. These decisions recognized that judicial immunity for court clerks transcended labelling the clerk's duties as ministerial in order to fix liability. In *Brown v. Dunne*, *supra*, 409 F.2d 341, 343, the Seventh Circuit held:

> But if the term ministerial is used as the Court in *Ex Parte Virginia*, 100 U.S. 339, 348, 25 L.Ed. 676 (1879) used it, it is plain that the charges [of mere errors or irregularities] against the judge, magistrate and clerks comprehend judicial rather than ministerial functions, and therefore, do not remove their official immunity.

The nature of the clerk's duties was not a factor in the determination of the clerk's immunity where "those performing ministerial acts under a judge's supervision and intimately related to judicial proceedings have quasi-

judicial immunity." *Ashbrook v. Hoffman*, 617 F.2d 474, 477 n. 4 (7th Cir. 1980).

Therefore, contrary to the Seventh Circuit's own precedent, the determination of the clerk's immunity was ripe for decision, not "premature". *Murray v. City of Chicago*, 634 F.2d 365, 367 n. 4 (7th Cir. 1981). The petitioner's notification of warrant recall orders was clearly performance of a quasi-judicial function required by court order and intimately related to judicial proceedings, thus entitling petitioner to absolute immunity.

In the absence of absolute immunity, clerks, like petitioner, knowing that an error in judgment will subject them to §1983 liability, will have no incentive to make decisions or suggestions to judges to promote the efficient administration of the judicial system. In the instant case, the petitioner, based on his experience, possessed the most insight into the problems of bond forfeitures and warrant recalls, and was in the best position to advise the Presiding Judge and the interested law enforcement groups which procedures would solve the notification problems. In the absence of immunity, however, only the Clerk of the Court will be liable if the bond forfeiture and warrant recall procedures recommended, created and implemented by the Clerk do not work one-hundred per cent of the time and in every case. The judicial immunity doctrine implicitly recognizes that errors will occur, especially in courts with overcrowded criminal dockets, so that indispensable court aides, like the petitioner, will have the freedom to make the best, if not necessarily perfect, decisions intended to benefit the court and the public, both of which clerks serve daily.

To deny court clerks the immunity enjoyed by the judges in a legal system presently subjected to un-

precedented strains, would instill in all clerks the fear that one inadvertent mistake will subject the clerk to §1983 liability, would inhibit the clerk's active interest to contribute toward positive improvements to the judicial system and, as a result, would deny the public their right to the most efficient administration of the judicial process. Denying absolute immunity to petitioner would fly in the face of policy considerations dictating the immunity and "disserve the broader public interest." *Imbler v. Pachtman, supra,* 424 U.S. at 427.

Immunity will shield the petitioner when he aids the judge he serves by devising procedures best suited, in the petitioner's judgment, to implement judicial orders including those orders recalling warrants. In turn, in the instant case, immunity will also accomplish the petitioner's ultimate dual purposes for the procedures, the assurance that the Chicago Police Department will be notified of recalled arrest warrants in order to protect the public from arrests based on recalled arrest warrants and the assurance that crime victims will be notified of new court dates caused by defendants who, like respondent, fail to appear in court and, thus, delay the proceedings.

Respondent's §1983 complaint attempts to establish that the petitioner is not absolutely immune by making bald conclusory allegations of an official policy based on the petitioner's notification procedures which did not communicate her single warrant recall order to the police. These conclusory allegations, however, reinforce the petitioner's need for absolute judicial immunity for acts performed pursuant to judicial order.

Public policy and historical considerations clearly establish that the petitioner enjoys the same judicial im-

munity shielding the judge who issued the warrant recall order in this case. The petitioner respectfully requests this Court to reverse the judgment of the Seventh Circuit and hold that the petitioner is absolutely immune from §1983 damages liability.

D. Available Alternatives To §1983 Liability For Clerks Of The Court Provide Superior Methods For Insuring That The Public Is Able To Remedy A Court Clerk's Misconduct.

In addition to the historical and public policy arguments establishing judicial immunity for court clerks, the fundamental question arises as to the overall necessity for allowing a §1983 damages suit as a remedy for a person injured by a court clerk's action or inaction. As with prosecutors, legislators and judges, the public is not powerless to remedy the misconduct of a court clerk and to punish that which occurs. In *Imbler v. Pachtman, supra*, 424 U.S. at 429, this Court emphasized the following:

> This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law. Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. §242, the criminal analog of §1983. *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974); *cf. Gravel v. United States*, 408 U.S. 606, 627 (1972).

Therefore, a clerk of the court will "fare no better for his willful acts" than judges or prosecutors. *Id.*

Illinois provides for criminal punishment of a court clerk "who fails to enter of record any order, judgment or decree of his court within 45 days after the same is made or rendered . . ." Ill. Rev. Stat. 1979, ch. 25, §15.

Furthermore, the same statute provides that the clerk may be removed from his office for any subsequent failure to comply with the mandatory provisions of the statute. *Id. See also* Ill. Rev. Stat. 1979, ch. 33, §33 and ch. 110, §62. *Cf.* Ill. Rev. Stat. 1979, ch. 38, §110-7(d).

Another section of the statute requires that every Clerk of the Court in Illinois post a bond, with one or more sureties, not less than $5,000 which is payable to the People of the State of Illinois upon a showing that the clerk or his deputies failed to execute the fiduciary duties of the clerk's office. Ill. Rev. Stat. 1979, ch. 25, §4.

The Illinois courts have historically held:

> [T]he bond is given to protect not only the interests of the county, but to protect the interests of any one who may be injured by the official acts of the clerk. "The object of an official bond is to obtain indemnity against the misuse of an official position for wrong purposes; and that which is done under color of office, and which would obtain no credit, except for its appearing to be a regular official act, is within the protection of the bond and must be made good by those who sign it." Murfree on Official Bonds, Sec. 211. *People v. Brown*, 194 Ill.App. 246, 250 (4th Dist. 1915); *appeal dismissed*, 272 Ill. 146 (1916).

These federal and state remedies, therefore, exist to protect the public from the acts of clerks of the court who wilfully act beyond the scope of their authority or, who in the absence of judicial directives, wilfully fail to comply with their statutory duties. As in *Imbler v. Pachtman, supra*, 424 U.S. at 429, these "checks undermine the argument that the imposition of civil liability is the only way to insure" that clerks of the court are mindful of the constitutional rights of the public. This Court, therefore, should uphold the ruling of the District Court and hold that clerks of the court are entitled to the same absolute immunity enjoyed by judges and prosecutors.

E. The District Court Properly Granted Summary Judgment For The Petitioner Where No Genuine Issue Of Material Fact Existed That The Petitioner Enjoyed Absolute Judicial Immunity.

The District Court granted summary judgment in favor of the petitioner. On appeal the Seventh Circuit Court of Appeals reversed and remanded the cause for "further clarification of the facts . . . to consider whether Finley is entitled to assert the defense of official immunity." *Murray v. City of Chicago*, 634 F.2d 365, 367 n. 4 (7th Cir. 1981). The petitioner submits that the Seventh Circuit erred in reversing the District Court's order granting summary judgment on behalf of the petitioner as the District Court's grant of summary judgment was clearly based on the petitioner's uncontroverted affidavits and documents which established the absence of a genuine issue of material fact and that the petitioner enjoyed absolute judicial immunity. Fed.R.Civ.P. 56(e).

Previous civil rights immunity decisions amply support the District Court's decision to grant summary judgment where the petitioner's immunity from liability was clear from the record. *See* 6 J. Moore, *Federal Practice* ¶56.17 [8.-1] at 56-763 n. 1 (2d ed. 1966); *Imbler v. Pachtman, supra*, 424 U.S. at 419 n. 13. In *Lockhart v. Hoenstine, supra*, 411 F.2d 455 (3d Cir. 1969), the Third Circuit affirmed the District Court's grant of summary judgment for the Prothonotary of the Superior Court of Pennsylvania. The Court held that the court clerk was absolutely immune from §1983 liability when his act depriving the *pro se* plaintiff access to appellate review was performed pursuant to court directive. As in *Lockhart*, summary judgment was required in the instant case where the District Court properly compared the petitioner's uncontroverted materials with the un-

supported allegations in respondent's complaint. *Id.* at 458-459.

The District Court carefully examined the warrant recall procedures as reflected in the petitioner's two documents and two affidavits detailing warrant recall procedures generally and respondent's specific warrant recall order in particular. (Pet. Cert. App. B at 18a) The District Court observed that the respondent did not file any opposing affidavits but, instead, relied solely on the "conclusory" allegations in her complaint. (Pet. Cert. App. B at 18a) The District Court held:

> In the absence of such specific allegations [how the warrant recall procedures were unconstitutional or how the petitioner's procedures proximately caused an unconstitutional act] the Court must conclude that the warrant recall procedures of the Circuit Court of Cook County are not unconstitutional as applied to the allegations of the plaintiff's complaint.
>
> The Court is unable to determine that any genuine issue of material fact exists in this case that would result in any judgment other than one for the defendant. *Kiess v. Eason*, 442 F.2d 712, Seventh Circuit, 1971. (Pet. Cert. App. B at 18a-19a)

In light of the District Court's foregoing careful application of Rule 56 to the record before it, the District Court, therefore, properly granted summary judgment for the petitioner.

Finally, the petitioner clearly required no more discovery from the respondent than the taking of her deposition in order to file his motion for summary judgment. Rule 56(e) neither required the petitioner to defer filing, nor required the District Court to defer ruling, on the petitioner's summary judgment motion until the respondent decided to file interrogatory requests or

notices of depositions. In fact, respondent failed to initiate any discovery in the eight months between the date the complaint was filed and the granting of summary judgment.

As in *Lockhart, supra*, 411 F.2d 455, no further clarification of the facts was necessary to determine whether the petitioner was entitled to absolute judicial immunity for acts performed pursuant to court order. As in the majority of Circuits, the District Court properly refused to permit the issues of the petitioner's §1983 liability and immunity to proceed past the pleading stage where, as in *Polk County v. Dodson, supra*, 50 U.S.L.W. at 4081, the complaint failed to allege that the petitioner's procedures were "constitutionally forbidden." Since the petitioner's uncontroverted affidavits and documents established petitioner's entitlement to absolute judicial immunity within the meaning of Rule 56(e), this Court should hold that summary judgment was properly granted for petitioner and reverse the Seventh Circuit's decision to the contrary.

CONCLUSION

For the foregoing reasons, Morgan M. Finley, the Clerk of the Circuit Court of Cook County, respectfully submits that this Court should reverse the judgment of the Seventh Circuit Court of Appeals, should uphold the order of the District Court granting summary judgment for the petitioner, and hold that the petitioner is entitled to absolute judicial immunity.

Respectfully submitted,

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